Nos. 82-354, 82-355, 82-398

Office-Supreme Court, U.S.
FILED
FEB 9 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 19[illegible]

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
Petitioners,

against

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
Petitioners,

against

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

against

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondent
Superintendent of Insurance
Two World Trade Center
New York, New York 10047
(212) 488-2464

PETER H. SCHIFF
Acting Attorney-in-Chief
Appeals and Opinions

ROBERT S. HAMMER
Assistant Attorney General

MARTIN MINKOWITZ
Deputy Superintendent and
General Counsel

MILTON L. FREEDMAN
Assistant Deputy Superintendent
and Counsel

New York State Insurance Department
Of Counsel

Question Presented

Whether the revocation by the National Highway Traffic Safety Administration (NHTSA) of the "passive restraint" requirements of Federal Motor Vehicle Safety Standard 208 was arbitrary, capricious and unlawful?

TABLE OF CONTENTS

	PAGE
Question Presented	1
Opinions Below	2
Jurisdiction	2
Statutes Involved	2
Statement of the Case	3
Summary of Argument	3
Point I—The Judgment of the Court of Appeals Was in Full Accord with the Administrative Procedure Act	5
Point II—Retention of the Passive Restraint Standard Will Clearly Protect Automobile Passengers from Death and Serious Injury and Result in Substantial Economic Savings	5
Point III—NHTSA's Rescission of the Passive Restraint Portion of Standard 208 Was Arbitrary, Capricious and Unlawful	11
Conclusion	15

TABLE OF AUTHORITIES

PAGE

Cases:

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 5

Industrial Union Dep't v. American Petroleum Institute, 448 U.S. 607 (1980) 5

Montgomery v. Daniels, 38 N.Y.2d 41, 340 N.E.2d 444, 378 N.Y.S. 2d 1 (1975) 7

Ostrer v. Schenck, 41 N.Y.2d 782, 364 N.E.2d 1107, 396 N.Y.S. 2d 335 (1975) 6

State Farm Mutual Automobile Insurance Company v. United States Department of Transportation, 680 F.2d 206 (D.C. Cir. 1982) 2

Statutes:

Administrative Procedure Act, Section 10(e) (5 U.S.C. § 706) 2

National Traffic and Motor Vehicle Safety Act of 1966, Section 103 (15 U.S.C. § 1392) 2

5 U.S.C. § 706(2)(A) 5
15 U.S.C. § 1381 5
15 U.S.C. § 1391(1)(2) 6
15 U.S.C. § 1392(a) 6
15 U.S.C. § 1394(a)(1) 2
15 U.S.C. § 1394(a)(4) 2
15 U.S.C. § 1397(a)(2)(A) 11
28 U.S.C. § 1254(1) 2
42 U.S.C. § 402 ..... 4, 10
42 U.S.C. § 423 ..... 4, 10

	PAGE
42 U.S.C. § 601	4, 10
42 U.S.C. § 1381	4, 10
N.Y. Insurance Law § 10	6
N.Y. Insurance Law, Art. VIIA (§§ 175-179)	9–10
N.Y. Insurance Law, Art. VIII (§§ 180-189)	10
N.Y. Insurance Law § 670, *et seq.*	7
N.Y. Insurance Law § 671(4)	9
N.Y. Insurance Law § 678	7
N.Y. Social Services Law § 157	4, 10
Federal Motor Vehicle Safety Standard 208	*passim*

Other Authorities:

Hartunian, *et al.*, "The Incidence and Economic Costs of Cancer, Motor Vehicle Injuries, Coronary Heart Disease, and Stroke: A Comparative Analysis", 70 Am. J. Public Health 1249 (1980)	10
N.Y. Times, Jan. 29, 1983, p. 12, col. 1	8n
N.Y. Times, Feb. 3, 1983, p. D2, col. 1	8n
Status Report, Vol. 16, No. 9, p. 1 (Insurance Institute For Highway Safety, June 24, 1981)	12
Status Report, Vol. 18, No. 1, p. 2 (Insurance Institute For Highway Safety, January 18, 1983)	12

Nos. 82-354, 82-355, 82-398

IN THE

Supreme Court of the United States

October Term, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
Petitioners,

against

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
Petitioners,

against

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

against

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK

Opinions Below

The June 1, 1982 opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 1a-76a)* is reported at 680 F.2d 206. The August 4, 1982 supplemental order and memorandum of the Court of Appeals (Pet. App. 79a-82a) are not reported.

Jurisdiction

The jurisdiction of the Court of Appeals was invoked pursuant to 15 U.S.C. § 1394(a)(1). The judgment of the Court of Appeals (Pet. App. 160a-161a) was entered on June 1, 1982, and the supplemental order of the Court of Appeals (Pet. App. 79a-80a) was entered on August 4, 1982. The petitions for a writ of certiorari in Nos. 82-354 and 82-355 were filed on August 30, 1982. On August 24, 1982, the Chief Justice extended the time for filing a petition for a writ of certiorari in No. 82-398 to and including September 8, 1982, and the petition was filed on that date. The petitions for a writ of certiorari were granted on November 8, 1982. The jurisdictions of this Court rests upon 28 U.S.C. § 1254(1) and 15 U.S.C. § 1394(a)(4).

Statutes Involved

Section 103 of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1392, and Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706, are reproduced in pertinent part in the Appendix to the Government's brief at 1a-2a.

---

* Numbers in parentheses preceded by "Pet. App." refers to the appendix to the petition for a writ of certiorari filed in No. 82-354.

Statement of the Case

In the interests of brevity, the Court is respectfully referred to the statement of the case contained in the briefs submitted by the other respondents and in the opinion of the Court of Appeals (Pet. App. 4a-24a).

Summary of Argument

The record of these proceedings demonstrates that NHTSA's rescission of Federal Motor Vehicle Safety Standard (FMVSS) 208 was arbitrary, capricious and unlawful. The Court of Appeals (Pet. App. 46a *et seq.*) gave due deference to the agency's views and properly employed the "rational basis" test relied upon by all parties.

The elimination of passive restraints violated the requirement of the 1966 National Traffic and Motor Vehicle Safety Act that NHTSA adopt practicable standards to promote motor vehicle safety. Passive restraints work. They can be installed in new automobiles at moderate cost, and will result in direct savings to the consumer in the form of reduced automobile insurance premiums. Premium discounts for vehicles equipped with passive restraints have already been adopted by insurers writing two-thirds of the automobile casualty business in New York. They will be mandated for the rest of the industry when passive restraints are implemented. The reduction in the number of deaths and the frequency and severity of personal injuries resulting from front-end collisions will, in addition, necessarily lessen the burden upon private life, accident and dis-

ability insurance, workers' compensation systems, Federal survivors (42 U.S.C. § 402) and disability insurance (*id.* § 423); Supplemental Security Income (*id.* § 1381), Aid to Families With Dependent Children (*id.* § 601) and other State public assistance programs such as New York's Home Relief, N.Y. Social Services Law § 157. Public and private employers would benefit from less employee time lost due to accidents and the need to hire substitutes. One cannot assign a dollar amount to the fewer widows and orphans, crippled and maimed that would result from the mandated use of passive restraints.

Regrettably, the Government has approached the requirement for passive restraints in an entirely irresponsible fashion. NHTSA first allowed the automobile industry to "comply" with Standard 208 by approving what it subsequently concluded was an easily defeasible seatbelt that was not a passive restraint at all. NHTSA could have moved to modify its standard if it determined it was defective. Rather, it invoked its own failure to enforce Standard 208 as an excuse to dispense with it entirely. When called to account by the Court of Appeals, its response was to propose yet additional, open-ended "study" of a matter which had been "studied" for well over a decade. NHTSA's approach to automobile passenger safety is to engage in a demonstrably ineffective program of "educating" the public to voluntarily use the presently mandated seatbelt system. Meanwhile, the needless slaughter on the highways goes on.

ARGUMENT

POINT I

The Judgment of the Court of Appeals Was in Full Accord with the Administrative Procedure Act.

In determining that NHTSA's rescission of FMVSS 208 was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," 5 U.S.C. §706(2)(A), the Court of Appeals followed the standard analysis applicable to informal rule making under the Administrative Procedure Act (Pet. App. 24a, *et seq.*) which the respondents, themselves, concede to be the appropriate standard of review. *See, e.g.*, Gov't Br. p. 23, *et seq.*; Consumer Alert Br. p. 6; see also *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971); *Industrial Union Dep't* v. *American Petroleum Institute*, 448 U.S. 607, 662-63 (1980) (Burger, C.J., concurring). Little, if anything, need be added to its opinion in this regard.

POINT II

Retention of the Passive Restraint Standard Will Clearly Protect Automobile Passengers from Death and Serious Injury and Result in Substantial Economic Savings.

In enacting the National Traffic and Motor Vehicle Safety Act of 1966, it was the express purpose of Congress to "reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents," 15 U.S.C. § 1381. To that end, Congress mandated that NHTSA adopt safety

standards that are "practicable [and] meet the need for motor vehicle safety". This is defined as—

> "the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and is also protected against unreasonable risk of death or injury to persons in the event accidents do occur, and includes nonoperational safety of such vehicles.
>
> " 'Motor vehicle safety standards' means a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria." 15 U.S.C. § 1391 (1)(2).

See also: 15 U.S.C. § 1392(a). By deleting from Standard 208 the requirement of automatic or passive restraints for the front seats of passenger cars—a measure that would offer substantial protection from bodily injury and the resulting economic loss—NHTSA failed to meet these statutory requirements. The clear effect of passive restraints in fulfilling the cost-effectiveness and practicability requirements of the statute can be seen in the area of automobile insurance. The pervasive role of the automobile as a major means of transportation has made automobile insurance coverage an essential form of protection. As regulator of the insurance industry in the State of New York,* the Superintendent of Insurance is the guardian of the State's

* The Superintendent of Insurance of the State of New York is charged with the rights, powers and duties express or implied by the Insurance Law in connection with the supervision of the business of insurance in New York, N.Y. Insurance Law § 10, *Ostrer* v. *Schenck*, 41 N.Y.2d 782, 785, 364 N.E.2d 1107, 1108, 1109, 396 N.Y.S.2d 335, 336-337 (1975). Other state insurance regulators have similar powers.

compelling interest in assuring the availability, at reasonable cost, of insurance protection against economic losses due to automobile accidents.

States such as New York have, in recent years, sought to reduce the cost of automobile insurance by such means as eliminating unnecessary litigation, through "no-fault" laws; making the payment of claims more efficient, and controlling the cost of medical care, N.Y. Insurance Law § 670, *et seq.*; § 678; *Montgomery* v. *Daniels*, 38 N.Y.2d 41, 49-52, 340 N.E.2d 444, 448-450, 378 N.Y.S. 2d 1, 7-10 (1975). The cost of insurance must, however, reflect anticipated claims. No matter how efficient the system is, only a reduction in the frequency and severity of automobile injuries holds a promise of large-scale premium reductions. (See generally, affidavit of Superintendent of Insurance Albert B. Lewis, sworn to December 22, 1981 in support of motion to intervene in Court of Appeals.)

These objectives, as well as those of Congress in legislating the Safety Act, are advanced by the requirement for passive restraints. During the course of the administrative proceedings, Dr. William Nordhaus, Professor of Economics, Yale University and a former member of the President's Council of Economic Advisors, testified without contradiction that the failure to employ passive restraints would result in an annual increase of 6,400 fatalities and at least 120,000 moderate to critical injuries, resulting from front-end collisions (Pet. App. 122a). These facts are not new; they have been conclusively established over the more than two decades in which automobile passenger safety research has been conducted and are conceded by NHTSA in its own analyses (Pet. App. 14a-15a, 94a). On the other

hand, the mandatory introduction of passive restraints would necessarily be translated into fewer and less expensive bodily injury claims and the savings would be passed on to the consumer.

As the Court of Appeals observed (Pet. App. 65a, n. 37), it is the Superintendent's intent to require all automobile insurers to introduce discounts on the personal injury portion of automobile insurance premiums applicable to cars equipped with proper passive restraint systems. They would be based upon reasonable projections of the expected reductions in the frequency and severity of injuries to passengers in motor vehicles so equipped. Anticipated performance would be reflected in lower automobile insurance premiums charged for such vehicles. Thus, whatever the consumer spends on airbags or other passive restraints may well be offset by premium savings alone.

It has been estimated that airbags, the most effective passive restraint, could be installed at a cost to the consumer of $200-$300, assuming the economics of mass production (Pet. App. 16a).* Since the average bodily injury portion of a New York no-fault premium is $75.00 per year, the 25-30% anticipated discount would translate into a total saving of $300 over a ten-year life of the average vehicle.

Bodily injury liability insurance premiums are closely related to the severity and cost of "no-fault" claims, since,

* The $800-$900 estimate for the 4,000 cars in which Mercedes-Benz plans to install airbags, N.Y. Times, Jan. 29, 1983, p. 12, col. 1, is clearly excessive for mass production and universal installation. A stark contrast to the mere ten per cent installation in a luxury car that its manufacturer would regard as proof of successful marketing of airbags as an optional extra. N.Y. Times, Feb. 3, 1983, p. D2, col. 1.

by definition, New York limits tort actions to "serious injuries", as defined in N.Y. Insurance Law §671(4). Bodily injury settlements and judgments tend to be multiples of special damages, *i.e.*, medical costs and lost wages which are payable under no-fault.

Since the severity and frequency of serious injuries will be reduced by passive restraints, a reduction of the bodily injury premium will necessarily follow. At present, the average bodily injury liability rate is $150, per year. Assuming an anticipated saving of only fifteen percent, per year over the same ten-year period—a most conservative estimate—the savings on this coverage would be another $300. Thus, the automobile insurance premium savings would more than offset the cost of universally installed airbags.*

It is also most significant that companies insuring more than two-thirds of the automobile risks in the State of New York have *already* filed rating plans which offer from twenty-five to thirty percent discounts on the Personal Injury Protection (no-fault) portion of automobile insurance premiums. This is a clear recognition by the insurance industry's actuaries of the expected reduction in the frequency and severity of death and injury to passengers in automobiles equipped with passive restraints. Upon the implementation of Standard 208, all insurers will be required to file rates which provide for appropriate passive restraint discounts. Such action would be based upon the Superintendent's statutory authority, N.Y. Insurance Law

* The foregoing analysis was compiled by the New York State Insurance Department on the basis of rate filings, which are public documents, and assumes a most convervative increase in premium rates of 8% annually.

Art. VII-A (Sections 175-179-a inclusive—"Rate Regulation and Promotion of Competition") and Article VIII (Sections 180-189 inclusive—"Rates and Rating Organizations") of the New York Insurance Law which provide that rates shall not be "excessive, inadequate or unfairly discriminatory" (N.Y. Ins. Law §§ 175 and 180). Other states employ comparable standards in their evaluation of filed rates.

In addition to the direct savings to the consumer in the form of lowered insurance premiums, the economy, as a whole, will derive significant benefits from the mandatory installation of passive restraints. One must bear in mind that the cost of automobile related death and injury is borne not only by private life, accident and disability insurers, but by workers' compensation systems, Federal Social Security survivors (42 U.S.C. § 402) and disability (*id.* § 423) insurance, as well.* The frequent need to replace a temporarily disabled worker places additional burdens on private and public employers alike. When private insurance, workers' compensation and payroll-tax funded Social Security programs are insufficient to support the injured parties, the burden falls directly upon the taxpayer in the form of claims for Supplemental Security Income (42 U.S.C. § 1381), Aid To Families With Dependent Children (*id.* § 601) and other state public assistance programs such as New York's Home Relief, N.Y. Social Services Law § 157.

---

* According to one study, the cost of medical care for victims of automobile accidents is second only to the cost of treating cancer and more costly than treating heart disease. See generally, Hartunian *et al.*, "The Incidence and Economic Costs of Cancer, Motor Vehicle Injuries, Coronary Heart Disease, and Stroke: A Comparative Analysis, 70 Am. J. Public Health 1249 (1980).

In the final analysis, however, one can never put a price tag on the broken bodies, broken families and shattered dreams that result from the needless death and injury that could be so easily avoided by the mandatory installation of passive restraints.

POINT III

NHTSA's Rescission of the Passive Restraint Portion of Standard 208 Was Arbitrary, Capricious and Unlawful.

A.

Although the National Traffic and Motor Vehicle Safety Act views with disfavor any practice which renders a safety device inoperative, 15 U.S.C. § 1397(a)(2)(A), NHTSA determined that a detachable seatbelt meets the requirement of Standard 208 and that, accordingly, automobile manufacturers may choose such a system instead of a non-detachable seatbelt or airbags.* But NHTSA reasoned, since the public can, and most people will, disengage detachable safety devices, Standard 208 would not achieve its purpose insofar as it related to passive restaints (Pet. App. 96a-105a). NHTSA's reasoning is contrary to clear Congressional mandate that effective mechanisms be included in motor vehicles to reduce the severity of injuries.** If NHTSA was unconvinced as to the performance of de-

* Compare the Volkswagen and Chevette, which feature automatic seatbelts with ignition interlock (Pet. App. 51a-54a).

** On the contrary, adoption of NHTSA's position at a time when smaller, lighter motor vehicles are replacing larger, more protective vehicles, could result in an increase in the severity of injuries and loss of life (Pet. App. 14a).

tachable belts, its duty was to require industry to offer a system which truly functioned as a passive restraint. As the Court of Appeals noted (Pet. App. 72a), the evidence, indeed, justified requiring the installation of airbags as the sole form of passive restraint.*

B.

Much has been said by NHTSA and the automobile manufacturers as well as some of their supporters that government ought not to require manufacturers to install passive restraints in automobiles, but should, instead, educate the public to the value of voluntarily utilizing the lap-shoulder belts presently in use. *See, e.g.*, Pet. App. 110a-112a, 126a). They advocate an educational campaign to use present seatbelt systems as a substitute for passive restraints with the full knowledge that such efforts have been an abysmal failure wherever tried, *Status Report*, Vol. 16, No. 9, p. 1 (Insurance Institute For Highway Safety, June 24, 1981). Indeed, Congressional skepticism as to the efficacy of spending money for educational campaigns which have proven to have no lasting effect was highlighted by its refusal to allow funds for such use, unless the Government required its own employees to use seatbelts and set specific goals against which the Congress could measure their worth, *Status Report*, Vol. 18, No. 1, p. 2 (Insurance Institute For Highway Safety, January 18, 1983).

* Except for forbidding the automatic ignition interlock, Congress has given free rein to NHTSA to develop effective safety standards. While it has shown a reluctance to affirmatively require specific methods to achieve results, its refusal to interfere with the passive restraint concept reflects an ongoing awareness and tacit approval of it.

The demonstrated futility of attempting to educate the public to voluntarily use lap and shoulder belts is but one more argument in favor of mandatory passive restraints.*

Thus, as Circuit Judge Mikva found (Pet. App. 74a), the administrative record demonstrates that NHTSA's rescission of Standard 208 was completely unjustified. As the Court of Appeals later noted, the agency showed no intention of setting its house in order by addressing the points discussed in that Court's opinion (Pet. App. 82a, 85a), but instead attempted to thwart its mandate by proposing yet an additional period of open-ended "study" (Pet. App. 130a, 139a, *et seq.*).

C.

It is, we suggest, significant that the National Association of Insurance Commissioners (NAIC), representing the insurance regulators of every state, commonwealth and territory, has, by unanimous resolution, determined to participate in this appeal as *amicus curiae* to urge affirmance of the judgment below. The NAIC acted with rare unanimity, demonstrating that not only the insurance industry as a whole but the insurance regulators view NHTSA's action here to be irresponsible and contrary to the public interest. Neither we nor the other regulators believe that the Court of Appeals' action involved any usurpation of the power of

* The automobile industry, by advocating the educational approach, would create the false impression that the currently available restraint systems were installed by its voluntary action. In fact, they were mandated by government directive after experience demonstrated that few members of the public would order them as optional equipment and industry refused to provide them as standard equipment (Pet. App. 6a, n). Now history is repeating itself with another campaign for voluntary self-protection.

the Executive. Indeed, it is the Executive Branch that has abdicated its responsibility to implement the will of Congress. It was nothing less than the Court of Appeals' obligation to require NHTSA to adhere to the statutory mandate.

The Government's request for a remand for further proceedings should be denied and the Court of Appeals' order that passive restraints remain part of Standard 208 affirmed. No useful purpose can be served by remanding to the agency for further administrative proceedings. It would only result in the continuation of the present attempt by NHTSA to undo over two decades of research and development and regulatory history and to repeal by administrative fiat the Congressional mandate to establish practicable standards for motor vehicle safety. Only a peremptory mandate to NHTSA to implement Standard 208 with 1984 models, if physically possible, will carry out the will of Congress and conform to the clearly established efficacy of installing the passive restraint systems. Any arguments by the automobile industry that it will not be able to comply should be rejected out of hand, since the industry has been on notice of its responsibility for nearly a decade (Pet. App. 6a).

Conclusion

The judgment of the Court of Appeals for the District of Columbia Circuit should be affirmed.

Dated: New York, New York
February 7, 1982

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondent
Superintendent of Insurance

PETER H. SCHIFF
Acting Attorney-in-Chief
Appeals and Opinions

ROBERT S. HAMMER
Assistant Attorney General

MARTIN MINKOWITZ
Deputy Superintendent and
General Counsel

MILTON L. FREEDMAN
Assistant Deputy Superintendent
and Counsel

New York State Insurance Department
Of Counsel